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In The

Supreme Court of the United States

October Term, 1994

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

1. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed. 2d 691 (1991), to require, after the fact, that the submitting state perform the duty to "identify" "unambiguously" the pre-existing law being repealed, when the Code of Federal Regulations at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer, supra*, to require the State in its § 5 preclearance submission to anticipate and project the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 preclearance?

3. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which she objects, following *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) as to requirements regarding burden of proof shifts in a remedial statute?

4. Whether a municipal school district possesses standing under § 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for § 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this

QUESTIONS PRESENTED FOR REVIEW – Continued

action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

5. Did the three-judge district court err in construing its duties under § 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

6. Whether, or what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) on § 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

7. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), generally has prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim § 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly

QUESTIONS PRESENTED FOR REVIEW – Continued

after *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)?

8. Is a certain portion of Mississippi's Uniform School Law of 1986, the Section 47 repealer of § 37-7-611, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Com'n*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Board of Trustee members are Dr. Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren G. Hood.

Defendants: Ray Mabus, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie D. Howell and Dr. Johnny R. Purvis. James Sider has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson. Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, W. Larry Thompson and Terry Ryals.

PARTIES TO THE PROCEEDINGS BELOW – Continued

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the three-judge district court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi are filing a separate jurisdictional statement, in which the Lamar County Board of Education also joins.

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No. 94-___

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On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

INTRODUCTION

The Appellants have filed this direct appeal from an injunction prohibiting enforcement of a Mississippi school law defining the geographic boundaries of abutting urban and county school districts. The United States District Court for the Southern District of Mississippi, in its decision dated August 27, 1993, held that the State of Mississippi had failed to meet the standards of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), when the State identified the Uniform School Law of 1986 in its entirety as the complete act to be submitted for review under § 5 of the Voting Rights Act, as opposed

to providing copies of statutes repealed by individual sections of the Act.

OPINION BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), *(Dupree I) vacated and remanded, Dupree v. Moore*, ___ U.S. ___, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992), on remand, *Dupree v. Moore*, 831 F. Supp. 1310 (S.D.Miss. 1993) *appeal dismissed, Moore v. Dupree*, ___ U.S. ___, 127 L.Ed.2d 69, 114 S.Ct. 872, 62 U.S.L.W. 3470 (U.S. 1994).

The Memorandum Opinion and Order of the three-judge district court on remand from this Court (*Dupree II*) is reported at 831 F. Supp. 1310 (S.D. Miss. 1993), 1993 WL 332265 and 1993 U.S. Dist. Lexis 14181 (S.D.Miss. Aug. 27, 1993). The decision is reprinted in the Appendix filed by Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, at App. B, p. 3a.[1] On April 13, 1994, that decision of the three-judge district court became final by entry of its Order denying a motion

[1] The Lamar County Board of Education and Trustees in their official capacities adopt the Appendix, A through Y, which appears in the Jurisdictional Statement of Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, referenced as page numbers 1a through 226a.

for new trial, to alter or amend judgment, and/or for a remedy to be fashioned. (App. A, p. 1a).

JURISDICTION

The three-judge district court granted its injunction by entry of summary judgment on August 27, 1993, rendered final by Order entered April 13, 1994. A notice of appeal was filed on May 12, 1994. The Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101, and 28 U.S.C. § 2106. (App. D, p. 38a).

The Lamar County Board of Education and Trustees join the Jurisdictional Statement being filed concurrently by Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, except to clarify that rulings from *Dupree I* are not to any extent foreclosed from review.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. T, p. 222a.

28 C.F.R. 51.25 (1986)

This regulation is reprinted in App. U, p. 224a.

28 C.F.R 51.27 (1987)

Each submission should contain . . . (b) A copy of any ordinance, enactment, order, or regulation embodying the

voting practice that is proposed to be repealed, amended, or otherwise changed.

28 C.F.R 51.35 (1986)

This regulation is reprinted in App. V, p. 226a.

28 C.F.R 51.54(b)(2)

The Attorney General will make the comparison based on the conditions existing at the time of the submission.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. H, p. 153a.

Miss. Code Ann. § 37-7-103
(1972 and Supp. 1990)

The two versions of this statute are set forth in App. K, pp. 122a and 123a.

STATEMENT OF THE CASE

This case is on appeal after remand for consideration in light of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). App. G, p. 74a. The question considered by the three-judge court on remand was whether the repeal of § 37-7-611, Miss. Code Ann. (1972), was precleared following the submission by the State of Mississippi of the entire Uniform School Law of 1986. The Uniform School Law contained the repealer of § 37-7-611, at its Section 47.

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the education reform act called the Uniform School Law of 1986. (App. J, p. 78a). One section,

Section 47 of the Uniform School Law, repealed a former provision, § 37-7-611, which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, Section 52 of the Uniform School Law, amended Miss. Code Ann. § 37-7-103 (1972) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that Section 52 of the Uniform School Law was precleared under § 5 of the Voting Rights Act.

Prior law under § 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of § 37-7-611 under the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by Section 52 of the Uniform School Law, which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. § 51.27(b)(1987) now provides that a copy of any repealed statute should be included with a § 5 submission of the repealing legislation. That specific regulation was not in effect at the time of this State's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the United States Department of Justice for preclearance under § 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submit ted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. J, p. 81a).

On August 29, 1986, the Justice Department represented that it did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) [the Uniform School Law] as identified in your July 22, 1986, letter." (App. M, p. 156a).

On March 31, 1989, the Justice Department interposed an objection to Section 47, the repealer of § 37-7-611. (App. Q, p. 183a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 184a). After the State asked for reconsideration, (App. R, p. 187a) the Justice Department again determined it would not withdraw the objection by its letter of May 25, 1990 (App. S, p. 217a) arguing that the Justice Department should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. S, p. 219a).

This civil action commenced on February 23, 1990, when the members of the Hattiesburg School District, individually and in their official capacities, filed suit against the Governor and Attorney General of the State of Mississippi. The City of Hattiesburg, within which the plaintiffs'-appellees' school district is located, had enjoyed a series of annexations into adjoining counties in 1966, 1979, 1981, 1982, 1985 and 1989. All annexations

that affected voting (except one[2]) in the City of Hattiesburg had been precleared under § 5 of the Voting Rights Act. While this case was pending, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined that it had concurrent jurisdiction with the local three-judge federal district court and held that the repealer of § 37-7-611 had been precleared pursuant to § 5 of the Voting Rights Act and further held that Section 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with [§ 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 945, 963 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10: "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of § 37-7-611 when he precleared Section 52." (App. B, p. 21a, n. 10).

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[2] The 1966 annexation into Lamar County was never precleared by the United States Justice Department. The 1966 annexation is the only Lamar County area sending children to school in Hattiesburg.

The Justice Department had concluded that repealing the automatic school district annexation provisions of § 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. Q, p. 185a). The Justice Department also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (App. Q, p. 185a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the three-judge district court held that enforcement of the repealer of § 37-7-611 was enjoined and denied the appellants Forrest and Lamar school districts' and the state's motion to fashion a remedy.

ARGUMENT

MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the Section 47 repealer of § 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state

law which were to go into effect if precleared.[3] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included." (App. B, p. 21a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (App. B, p. 20a).

The dissent in the three-judge district court below points out that this ruling exceeds the holding of *Clark v. Roemer*, 500 U.S. 646, 11 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made.[4] Additionally, this ruling below raises questions of retroactive application of civil rights rules. *Compare, Landgraf v. USI Film Products*, and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) with *Powell v. Nevada*, ___ U.S. ___, 114 S.Ct. 1280,

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[3] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) is supplanted by the new 28 C.F.R. 51.27 (b)(1987) providing that a copy of any repealed statute should be included with the § 5 submission of the repealing legislation.

[4] The Justice Department states its view in opposition to retroactivity at 28 C.F.R. 51.54(b)(2): "The Attorney General will make the comparison based on the conditions existing at the time of the submission."

1994 U.S. LEXIS 2655, 128 L.Ed.2d 1, 62 U.S.L.W. 4203 (1994). It would be appropriate to remand this case for consideration of the retroactive application of Justice Department regulations.

THE DECISION BELOW RAISES QUESTIONS AS TO THE PROPER GEOGRAPHIC FOCUS OF A § 5 SUBMISSION

The impact of the three-judge court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 review. There is nothing in *Clark v. Roemer, supra,* which requires or addresses this result. There is a question as to what is the proper geographic focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue was raised this term in *Johnson v. De Grandy,* 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted,* ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993), *aff'd in part and rev'd in part on other grounds.* 1994 U.S. LEXIS 5082 (June 30, 1994).

The United States Supreme Court should determine in this case the appropriate range for a § 5 submitting authority.

THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

Last term, this Court decided *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407

(1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in § 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Justice Department did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boilerplate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Justice Department had objection, neither did it request further information. To use St. Mary's as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify the objection itself. The State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the three-judge district court's decision in *Dupree I*, 776 F. Supp. 290 (S.D. Miss. 1991) that, because the United States Attorney General had not objected, Section 47 was precleared.

Although the three-judge district court did not abide by that result in its more recent decision, the confusion, which has been produced throughout this case, is more

the product of the ambiguity of the Justice Department's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to § 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future.

THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER § 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The three-judge district court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. A, p.1a and App. B, p. 3a *et seq.*). It did make critical fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy. This ruling below leaves the parties in doubt as to how to hold elections.

Brooks v. Georgia Board of Elections held that a three-judge court has limited discretion to fashion an appropriate remedy in a § 5 action, 790 F. Supp. 1156 (S.D.Ga. 1990). This recent Brooks decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court in a § 5 voting rights case. For example, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd*, 455 U.S. 936, 102 S.Ct. 1424, 71 L.Ed.2d 646 (1982), held that the

appropriate remedy must be tailored to affect voting and not geographic territory, by refusing to de-annex unprecleared annexed territory but enjoining the annexed citizens from voting in city elections.

Does the court below possess jurisdiction under § 5 to carve up the Lamar County School District, as the Hattiesburg School District plaintiffs demand? It would be appropriate to remand this case for further consideration for the fashioning of an appropriate remedy.

THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING; THEY PRESENT NO COGNIZABLE INJURY UNDER § 5 OF THE VOTING RIGHTS ACT

To find § 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the three-judge court held that Section 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[5] However, enjoining Section 47, on the city school board's own argument, brings about an automatic extension of the school district boundaries to be coterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both

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[5] See discussion of changes affecting voting in *Dupree II*. (App. B, pp. 7a and 8a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause; (App. B, p. 7a); there is no mention of indirect impact upon appointive officers, a point discussed more fully *infra*.

the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

This Court recently stated that the dimensions of a governing authority "is a 'standard, practice, or procedure with respect to voting' " because it "increases or diminishes the number of officials for whom the electorate may vote," *Holder v. Hall*, ___ U.S. ___, 1994 U.S. LEXIS 5083 (June 30, 1994), p. 9 (O'Connor, J., concurring) because "this change bears 'on the substance of voting power' and has 'a direct relation to voting and the election process.' " (internal cites omitted), *Id.*, p. 47 (Blackmun, Ginsburg, JJ, dissenting). As this Court has defined standing in the voting rights context: "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.*, p. 10 (O'Connor, J. concurring).

The Plaintiff Hattiesburg school board should not have standing to seek the very dilution of minority voting strength which gives rise to § 5 jurisdiction in this matter.

THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

Last term in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy, and considered a similar issue this term and

remanded in *Louisiana v. Hays*, 839 F. Supp. 1188 (W.D.La. 1993), judgment vacated and case remanded, ___ U.S. ___, 1994 U.S. LEXIS 4889, 62 U.S.L.W. 3853, 3859 (June 28, 1994).

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a *Reynolds v. Sims*[6] "one person, one vote" inquiry. *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967). In *Sailors*, "one person, one vote" relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that the board was fundamentally more administrative than legislative.[7] Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[8] without assuming responsibility for

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[6] 377 U.S. 533 (1964)

[7] For a recent discussion touching on executive versus legislative function as a determining element for voting rights act coverage, *see Holder v. Hall, supra*, at pp. 50-51 (Blackmun, dissenting,) joined by Justice Stevens, Justice Souter, and Justice Ginsburg).

[8] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases, it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974) has generally prevented equal-protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim § 5 statutory coverage under the Voting Rights Act for a change affecting district boundaries for appointed school board members. Allowing the Justice Department a broader sweep through its § 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Whether or to what extent must a three-judge court give deference to a prior state Supreme Court ruling on the identical issue construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388(1993), which held that a state has primacy in the redistricting domain under § 2 of the Voting Rights Act? There, relying on *Scott v. Germano*, 381 U.S. 407 (1965), the United States Supreme

Court required federal courts to recognize that the state's instrumental role in redistricting inheres in the judicial branch as well as the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Ibid.*, at 122 L.Ed.2d 400. *Compare, Johnson v. De Grandy*, ___ U.S. ___, 1994 U.S. LEXIS 5082 (June 30, 1994) (Within the peculiar facts presented, the three-judge district court in Florida held properly to have refused to give preclusive effect to the State Supreme Court's decision on the same voting rights case.).

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1990), *cert. denied*, 502 U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that Section 47 had been precleared and that if Section 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court also construed state law, by holding that Section 52 which was precleared,[9] was in conflict with Section 47 and, due to rules of statutory construction Section 52 would prevail. In light of that decision, and its subsequent denial of certiorari, the result in Greenville, Mississippi, and in any other city

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[9] Section 52 was among the 13 express submissions of the State of Mississippi specifically identified in the submission of the Uniform School Law of 1986 to which the Attorney General specifically entered no objection. (App. G, p. 84a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

able to litigate only in state court, will be to design city limits and school districts in accordance with Sections 47 and 52, while expanding cities, which are found under jurisdiction of the federal courts, will be enjoined from use of Section 47.[10] Thus, as in *Growe v. Emison, supra*, the State can have only one set of school districts, but the divergent results of the state and federal courts allow two different rules of law to compete.[11] The three-judge district court below has ignored the primacy of the State in designing those districts. It is this primacy to which a federal district court should be compelled to defer. *Growe v. Emison, supra*. That ruling concerning § 2 of the Voting Rights Act should be extended by analogy to § 5 of the same Act.[12]

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[10] The remedial effect and impact of Section 52 if 47 is enjoined remains undecided by the Court below.

[11] In *Hathorn v. Lovorn*, 457 U.S. 255, 269 n.23 (1982) the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a § 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result. An issue of collusiveness with voting rights implications was presented in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. en banc 1993) *cert. denied, LULAC v. Attorney General*, 127 L.Ed.2d 74, 1994 U.S. LEXIS 991, 114 S.Ct. 878, 62 U.S.L.W. 3471 (U.S. 1994).

[12] It appears unresolved whether influence dilution claims are actionable under § 2 of the Voting Rights Act. *See, e.g., Voinovich v. Quilter*, ___ U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). It also appears to be an open question as to whether the Fifteenth Amendment applies to vote dilution claims. *Id.* The coextention vel non of Section 5 and Section 2 led to a split of opinions in *Holder v. Hall, supra*.

There is also the question as to whether the District Court should be bound by the State Supreme Court's construction of a previously precleared statute. If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control, *e.g.*, "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court" *R.A.V. v. City of St. Paul, Minnesota*, 502 U.S. ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH* COUNTY COMMISSIONERS

Is a certain portion of Mississippi's Uniform School Law, the repealer of § 37-7-611, Section 47 of the Uniform School Law, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found § 5 applicable on the basis of an "indirect" effect on voting. The three-judge court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. Last term, in *Presley v. Etowah County Commissioners, supra*, the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer*, 861 F.2d 603 (10th Cir. 1988) *cert. denied* 492 U.S. 921 (1989). The ruling from the three-judge district court cannot be reconciled with these prior decisions.

CONCLUSION

This case raises many problems because it attempts to apply the Voting Rights Act at cross purposes with the Congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the three-judge district court's opinion below, left uncorrected, would lead to the future use of the Voting Rights

Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of political representation, as was the intent of the Voting Rights Act.

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July 11, 1994

No. 94-66 and No. 94-82

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From
The United States District Court
For The Southern District of Mississippi

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. 646 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that the State of Mississippi failed to identify with specificity in its submission of other voting changes.

Whether the District Court properly exercised its remedial powers in a § 5 action by enjoining the enforcement of an unprecleared law until the State complied with the Voting Rights Act.

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No. 94-66 No. 94-82

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the order of the District Court because the questions are so insubstantial that further argument is unnecessary. The

District Court's decision is based on well-established precedent and presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

Since 1926, Mississippi law has required that the boundaries of a city school district be, at a minimum, coterminous with its parent city. Thus, the residents of the city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of the school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

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[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that extension by annexation of a city's boundaries across a county line would not affect the boundaries of the adjacent county school district unless the county school district consented to allow the annexed area to be included in the city school district. J.S. App. 5a-6a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, ___ U.S. ___, 117 L.Ed. 2d 609 (1992). No cross-appeal of this portion of the District

As a result of the repeal of § 37-7-611, the residents of an area annexed by the city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created the anomaly of the newly annexed residents continuing to elect directly the board members of their county, or suburban, school district, while indirectly selecting the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1982, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property annexed by the City.

The State of Mississippi enforced these laws despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg School District, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The

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Court's judgment in Dupree I was filed. As the Appellants now concede, no issue related to the enforceability of the amendments to § 21-1-59 is before the Court. No. 94-66 J.S. p.9 n.7

Appellees sought declaratory and injunctive relief to halt enforcement of the laws.[2]

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I), vacated and remanded sub. nom, Dupree vs. Moore, ___ U.S. ___, 117 L. Ed. 2d 609 (1992). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. 646 (1991).

On remand, the District Court held that, when measured by the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared. The State did not specifically identify the voting change effected by the repealer in its 1986 submission of other voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II), appeal dismissed, ___ U.S. ___, 127 L.Ed 2d 69 (1994).

After the District Court issued Dupree II, the Appellants filed joint motions under Fed. R. Civ. P. 59 to alter or amend, for a new trial and for a remedy, and under Fed. R. Civ. P. 62 for a stay pending appeal. Before the District Court ruled on these motions, the Appellants filed an appeal to this Court. The District Court denied the Rule 62 motion on October 29, 1993, and withheld ruling on the

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[2] After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both school districts, board members are elected directly by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3.

Rule 59 motions pending resolution of the appeal. The Court dismissed the appeal for lack of jurisdiction on January 18, 1994, and the District Court denied the Rule 59 motions on April 13, 1994. J.S. App. 1a, 77a.

The focus of this appeal--the status of the repealer of § 37-7-611--requires a review of the submission histories of the Uniform School Law and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the Uniform School Law, a sweeping act affecting a wide range of topics. This Law consisted of 203 sections and repealed, enacted or amended more than 300 separate statutes. Section 47 of the Uniform School Law repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 121a.

Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a city school district. With the consent of the city school district, the county board of education could add to the city school district any part of the county adjoining the city school district or detach territory from the city school district and merge it into the county school system. Section 37-7-103 now provides that any school district has authority to alter its boundaries by agreement with an adjoining district. J.S. App. 122a-123a.

The State submitted the Uniform School Law to the Attorney General for preclearance on July 22, 1986. J.S. App. 78a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page

looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the Uniform School Law. J.S. App. 93a-152a.[3]

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 224a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the document provided under" § 51.25(a), the submission must contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and

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[3] The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the Uniform School Law. Thus, the State did not attempt to provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed. The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." The Note further stated that "[t]his section by section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law." The Note concludes as follows: "By comparing each section of [the Uniform School Law] and the current practice, the changes to current law are easily identified." By the State's own admission, however, these comparisons were made only for statutes amended by the Law. J.S. App. 93a.

proposed situation with respect to voting." J.S. App. 224a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 81a.]

The State specifically identified thirteen of the 203 sections of the Uniform School Law. J.S. App. 81a-87a. Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. The brief text of § 47 does appear, without explanatory comment by the State, in a copy of the Uniform School Law and the looseleaf booklet supplied to the Attorney General. J.S. App. 121a. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 83a.

The discussion of § 52 in the State's submission consisted of a paraphrase of the then-current statute and the amended version but made no mention of § 47 or § 37-7-611. The analysis of § 52 did not refer in any way to the State's longstanding policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not say, or even suggest, that § 52 was designed to replace the policy reflected in § 37-7-611.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in your July 22, 1986, letter." J.S. App. 156a (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 191a, and conceded in the District Court that the State's July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p.8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 158a. In its submission of § 47, the State acknowledged that the entire Uniform School Law was not precleared by the Attorney General. See, e.g, J.S. App. 161a ("The major part of [the Uniform School Law], as it deals with the Voting Rights Act . . . has already been precleared."); J.S. App. 164a ("[M]ost of" the Uniform School Law has "already been precleared by the "Justice Department.); J.S. App. 164a ("[S]ubstantive parts of" the Uniform School Law were "precleared by the Justice Department.").

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. Moreover, the State expressly represented that § 47 had not been specifically identified in the earlier submission of the Uniform School Law:

> On July 22, 1986, the State of Mississippi submitted [the Uniform School Law] for preclearance under Section 5 of the Voting Rights Act. On August 29, 1986, [the Uniform School Law] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [J.S. App. 174a (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the Uniform School Law or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 187a. The State contended for the first time that the entire Uniform School Law had been submitted and precleared in 1986. J.S. App. 189a-193a. On May 25, 1990, the Attorney

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[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 183a.

General rejected the State's position because it "appear[ed] to seriously misconstrue the structure, purpose, and history of the preclearance requirement." J.S. App. 218a. Section 5 "plainly fixes the responsibility for identifying voting changes on the state, not the . . . Attorney General. [Y]et the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made." J.S. App. 219a.

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the Uniform School Law and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. J.S. App. 63a-71a. The Appellees in this appeal filed an appeal of that portion of the District Court's judgment in Dupree I. The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, 500 U.S. 646 (1991), which emphasized a state's obligation to identify with specificity each voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark vs. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission.

J.S. App. 22a. As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable until Mississippi obtains administrative or judicial preclearance. J.S. App. 22a-23a, 36a-37a.

ARGUMENT

A. The District Court's interpretation of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision in Dupree II is a straightforward application of Clark vs. Roemer. The District Court's holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not undermine the process for administrative preclearance because the Justice Department's position prevailed in the District Court. The District Court's decision in Dupree II is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights Act to identify clearly the voting changes submitted to the Attorney General for preclearance. The relaxation of that burden on submitting jurisdictions would "subvert the efficacy of administrative preclearance under § 5." Clark vs. Roemer, 500 U.S. at 655. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would be disserved.

Since Allen vs. State Bd. of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided direction on this issue, and the principles articulated in that decision were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. We established also that any ambiguity in the scope of a preclearance request must be resolved against the submitting authority.

500 U.S. at 656 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id.

at 658. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id. at 657.

In light of Clark, the District Court in Dupree II correctly held that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which city school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent city. Nor did the 1986 submission indicate that this process was repealed by § 47 of the Uniform School Law. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method of altering school district boundaries. The State, however, did not identify the amendment of § 37-7-103 in this manner in the submission. The discussion of amended § 37-7-103 reveals only that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 83a. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 500 U.S. at 658 (quoting McCain).

The Appellants also point to the statements that the Uniform School Law was submitted "in its entirety" and that "the complete act is submitted for review." The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p.17 n.13. A clear statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of city school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that, although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than 100 statutes, including § 37-7-611, listed, without elaboration, as having been repealed in the 1986 submission.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants and the dissent below. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that before a state's

voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 500 U.S. at 658. Requiring the Attorney General to conduct independent research to determine whether a submission contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the reliance on administrative preclearance, Clark emphasized the necessity that the State identify each change so the Attorney General can perform her duties under § 5. 500 U.S. at 658.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, however, might well delay "the implementation of validly enacted, nondiscriminatory state

legislation," a primary objective of administrative preclearance. See Morris vs. Gressette, 432 U.S. 491, 503 (1977).[5] Although such a response by the Attorney General would be the most prudent exercise of his responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973).

In the context of judicial preclearance, a covered jurisdiction could not argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

The Appellants also construct an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 226a. The Appellants' position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. To the contrary, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before

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[5] The Appellants' reliance on Morris is misplaced. The issue presented in this appeal--whether a voting change was properly submitted to the Attorney General--was not present in Morris. The submission in Morris was complete and unambiguous. 432 U.S. at 502, 504 & n.19.

him for review. This view of the submission is confirmed by the Attorney General's August 29, 1986 response in which he referred to the "voting changes . . . identified" in the State's submission. J.S. App. 156a.

Second, the Appellants' reliance on the lack of a request for additional information reflects a flawed perception of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out other potential voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

B. The remedy imposed by the District Court for the violation of § 5 is consistent with the Court's precedent and the purposes of the Voting Rights Act.

The Appellants contend the District Court failed to issue a "specific, equitable" and "appropriate" remedy. No. 94-66 J.S. p.26; No. 94-82 J.S. p.12. The District Court enjoined the enforcement of the repealer of § 37-7-611 until the State complies with the preclearance requirements of the Voting Rights Act. J.S. App. 22a-23a, 36a-37a. This remedy is entirely consistent with the remedy either affirmed or mandated by the Court in prior § 5 cases, including Clark

vs. Roemer, which stated: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 500 U.S. at 652-53; see, e.g., Dougherty County Bd. of Educ. vs. White, 439 U.S. 32, 36 (1978); Berry vs. Doles, 438 U.S. 190, 191 (1978) (per curiam); Georgia vs. United States, 411 U.S. at 541; Perkins vs. Matthews, 400 U.S. 379, 397 (1971); Allen vs. State Bd. of Elections, 393 U.S. at 572.[6]

The Appellants argue that McCain vs. Lybrand "emphasized the [District Court's] duty to adopt voting remedies by making . . . suggestions" such as the Court did in that case. No. 94-66 J.S. p.28. They misread McCain. The portion of McCain cited by the Appellants relates to an identification of voting changes effected by a state statute, not proposed remedies available to the district court. 465 U.S. at 250 n.17. The parties in McCain stipulated that submission of the voting changes was required; thus, "the parties understandably have made little effort to define precisely the nature of the changes in elections practices made by the [state statute] which required preclearance." Id. Noting that the parties agreed on one particular change, the

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[6] The "confusion", "chao[s]" and "doubt" purportedly created by the remedy in Dupree II is more imagined than real. See No. 94-66 J.S. pp.26, 29; No. 94-82 J.S. p.12. The Plaintiffs (Appellees here) did not request the District Court to modify school district boundary lines. That issue, as Forrest County and the State acknowledge, is presently before the court that oversees the Hattiesburg School District's desegregation order. See No. 94-66 J.S. p.29 n.10. The Appellants are parties to that desegregation case and each has filed pleadings opposing any modification of school district boundaries.

Court "suggested" several other voting changes made by the state statute. Id.; see id. at 239-40 (explaining the voting practices in existence prior to enactment of the statute under review). These changes were not, as the Appellants contend, "suggestions" for the district court to consider or implement on remand as part of a remedy. Instead, they were changes made by the state to its voting laws.

Clark vs. Roemer reaffirmed that the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." 500 U.S. at 659. (quotations omitted). In granting relief, the district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660. The Appellants raised on several occasions in the District Court the same arguments pressed now on appeal. The District Court concluded that "the most equitable and practicable" remedy was to enjoin the repealer of § 37-7-611 until the State complies with § 5.

The remedy proposed by the Appellants in the District Court called for school district boundaries to remain unaffected by Dupree II and to preclude the newly annexed residents of the City of Hattiesburg from voting in county school board elections. This suggested remedy is neither equitable nor practicable. It deprives voters in the county school district of the right to vote for county school board members who have the power, among others, to determine the amount of taxes imposed on residents of the county school district. See Miss. Code Ann. § 37-57-105 (procedure for raising revenue from property taxes imposed on residents of school district). In addition, the Appellants' proposed remedy does not overcome the objection made by

the Attorney General to the repealer of § 37-7-611. The residents of the county school district would still indirectly select city school board members by participating in city elections. J.S. 185a.

In attacking the District Court's remedy, the Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public School Dist. vs. Western Line Public School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court in Dupree II should have deferred to the state supreme court's holding, No. 94-82 J.S. pp. 16-18, and "recognized that § 37-7-103 must supersede § 37-7-611," No. 94-66 J.S. p.25.

The District Court correctly rejected this contention, holding that "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 21a n.10. If the State of Mississippi desires to repeal § 37-7-611 and, as a result, effect a change in its voting laws, the preclearance requirements of § 5 must be satisfied, regardless whether the repeal arises from legislative action or by judicial decree. See Hathorn vs. Lovorn, 457 U.S. 255, 269 n.23 (1982); McDaniel vs. Sanchez, 452 U.S. 130, 153 (1981). The State's discussion of the amendment to § 37-7-103 did not identify any attendant change in the State's policy regarding the effect on school district boundaries after an annexation. Therefore, the Attorney General did not preclear the amendment to § 37-7-103 as a replacement for § 37-7-611.

In summary, Dupree II correctly applied Clark vs. Roemer and prohibited the State from enforcing the repealer of § 37-7-611 until the State receives either administrative or judicial preclearance. Dupree II upheld the Attorney General's objection because the State did not specifically identify the voting change effected by the repealer in the 1986 submission of the Uniform School Law. The District Court's decision is correct and further argument is unnecessary.[7]

CONCLUSION

For these reasons, the District Court's decision should be summarily affirmed.

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[7] The Appellants raise several questions concerning standing and the proper scope and application of § 5. No. 94-82 J.S. pp.10-16, 19-20. Dupree I decided these questions against the Appellants and no appeal was taken. Moreover, the District Court's resolution of these issues does not present a substantial question.

(3) (3)

No. 94-66 and No. 94-82

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, *et al.*,

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vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

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Appellees.

On Appeal From
The United States District Court
For The Southern District Of Mississippi

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

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No. 94-66 No. 94-82

IN THE

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October Term, 1994

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SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

I. Introduction

The purpose of this supplemental brief is to bring to the Court's attention the role of the United States in this case. The United States' consistent position throughout this litigation has been that the State of Mississippi did not comply with § 5 of the Voting Rights Act when it failed to identify with specificity the voting change in issue in a submission of other voting changes in 1986. The Solicitor General reaffirmed this position in his February 1992 brief as amicus curiae during the initial appeal of this case to the Court. Therefore, Appellees respectfully suggest that it is unnecessary for the Court to invite the Solicitor General to express the views of the United States on this case.

The suggestion to dispense with an invitation to the Solicitor General is not made out of fear that the United States' position has changed since 1992. Rather, it is based on our belief that, because of the nature of the issue presented, the United States' position has not changed and a reiteration of that position will not significantly aid the Court's decision-making process. The central issue on appeal concerns administrative preclearance under § 5. The District Court held that the State's 1986 submission failed to satisfy the standards outlined in Clark vs. Roemer, 500 U.S. 546 (1991), and earlier cases. These standards require that a jurisdiction identify with specificity each voting change for which its seeks administrative preclearance. In his 1992 brief, the Solicitor General stated that Clark removed any doubt that the State's 1986 submission failed to comply with § 5.

This litigation, which is entering its fifth year, applies not just to the operation of the three school districts that are

parties but also to every city and county school district in Mississippi affected by any municipal annexation. In light of the importance of this case to Mississippi public school districts and because the position of the United States has already been expressed, we respectfully suggest that the District Court's decision be summarily affirmed without inviting the Solicitor General to express again the views of the United States on this case.

II. The United States has Consistently Maintained that the State of Mississippi Failed to Submit Properly the Repealer of § 37-7-611 in 1986.

In March 1991, one year after the Appellees filed this action, the United States moved to participate as amicus curiae in support of the Appellees' position. J.S. App. 47a n.2. The United States argued that the State failed to receive preclearance of the repealer of § 37-7-611. Id. In Dupree I, the District Court rejected the position of the Appellees and the United States. J.S. App. 45a.

On appeal, the Solicitor General urged that the District Court's decision in Dupree I be vacated in light of the Court's intervening decision in Clark vs. Roemer. Brief for United States as Amicus Curiae at 13, Dupree vs. Moore, 117 L. Ed. 2d 609 (1992) (No. 90-1977). In addition, the Solicitor General stated that the principles in Clark "lead ineluctably to the conclusion that the [repealer of § 37-7-611] was not precleared when the Attorney General precleared the 'voting changes...as identified in' the State's 1986 letter." United States' Brief at 12-13; see also id. at 16 ("In short, the State's 1986 submission, when measured against the standards set out by this Court in Clark, did not include the repeal of Section 37-7-611."). After noting that the factors upon which the

District Court relied in Dupree I "are essentially irrelevant, as measured by Clark," Brief of United States at 17, the Solicitor General concluded: "Insofar as this Court's opinion in McCain [vs. Lybrand, 465 U.S. 236 (1984),] left any doubt that the premise of the district court's decision [in Dupree I] was incorrect, that doubt was removed by Clark." United States' Brief at 18-19.

The Court vacated Dupree I and remanded for further consideration in light of Clark. On remand, the United States, as amicus curiae, argued that Clark compelled a different outcome in the District Court. In Dupree II, the District Court ruled in favor of the Appellees and the position advanced by the United States. J.S. 3a.

The issues on appeal are not the subject of a conflict among the circuits and do not present a novel or controversial application of the Voting Rights Act. Instead, this appeal is squarely controlled by the Court's 1991 decision in Clark vs. Roemer. The United States has consistently maintained during this case that the State failed to comply with the standards set out in Clark.

III. Conclusion

For the foregoing reasons, the Appellees respectfully request that the Court summarily affirm the District Court's decision without inviting the Solicitor General to express the views of the United States.

RESPECTFULLY SUBMITTED,

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On Appeal From The United States District Court For The Southern District Of Mississippi

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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ARGUMENT

I. THERE IS A SUBSTANTIAL ISSUE AS TO PRECLEARANCE UNDER THE VOTING RIGHTS ACT.

The central issue involved in this case is whether the State of Mississippi clearly identified the change in the law governing municipal annexations as one of the changes to be precleared, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by the United States Attorney General in 1986. Contrary to the Appellees' argument (See Supplemental Brief in Support of Motion to Affirm of September 2, 1994), that is a substantial question. The substantial nature of the question presented is conclusively shown by the fact that the decision below was split 2 to 1, (See Lamar County's Jurisdictional Statement of July 11, 1994, at pp. 2-3) and the Mississippi Supreme Court has disagreed with the majority of the three-judge court below, *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). Indeed, if one were to count "judicial heads" at this time, the State's position would win. Thus, this is hardly a case where there is no substantial basis for the argument on appeal.

II. SCHOOL DISTRICTS NEED GUIDANCE AS TO HOW TO ABIDE BY THE LAW.

As the Appellees, the Board of Trustees of the Hattiesburg Public School District, themselves recognize (Supplemental Brief in Support of Motion to Affirm, p. 3) the issue presented is important to "every city and county school district in Mississippi . . . ". However those

districts do not know what the law is. *Matter of City of Horn Lake,* 630 So.2d 10, 24 (Miss. 1993) (Impact on voting must be considered in reasonableness of annexation); *Enlargement of Boundaries of Yazoo City v. City of Yazoo City,* 452 So.2d 837 (Miss. 1984); *Matter of Boundaries of City of Jackson,* 551 So.2d 861 (Miss. 1989); *In the Matter of the Enlargement of the Corporate Limits of the City of Hattiesburg,* 588 So.2d 814, 826 (Miss. 1991) ("there was a good school close by"). On the one hand, the Mississippi Supreme Court has ruled that the 1986 law was precleared. *Western Line, supra.* The United States Supreme Court declined to review that decision, even after the Court had issued its opinion in *Clark v. Roemer,* 500 U.S. 646 (1991). On the other hand, the majority of the three-judge district court in this case has ruled, with one dissent, that the 1986 law was not precleared. The school districts and state courts in Mississippi, therefore, are entitled to a fully informed decision from the United States Supreme Court that will finally resolve the issue.

III. THE DECISION BELOW IS NEITHER CORRECT NOR COMPELLED BY *CLARK V. ROEMER.*

The three-judge district court held that the State did not adequately identify the change in the law because the State did not submit a copy of the repealed law. The then-applicable administrative regulations, however, did not require such a submission. Thus, the decision below is neither correct nor compelled by *Clark v. Roemer, supra.*

CONCLUSION

The Motion to Affirm should be denied and this Court should enter an order noting probable jurisdiction.

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Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

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No. 94-66 and No. 94-82

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

I. Introduction

In its brief, Amicus Curiae United States urges remand of this case to address the question of the severability of the non-voting aspects of Miss. Code Ann. § 37-7-611 from the voting aspects of the statute. U.S. Br. at 19. The United States presumes the District Court failed to consider the specific arguments made by the parties regarding the appropriate remedy for the State's violation of the Voting Rights Act. Remand is unnecessary because this issue has already been presented to the District Court, although not in precisely the same form suggested by the United States.[1]

II. In The District Court, The Appellants Argued That The Court's Remedy Should Be Limited To The Voting Aspects Of Section 37-7-611.

In Dupree II, the District Court held that "[t]he repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable." J.S. App. 37a. In a Rule 59 motion, the Appellants requested the District Court to limit its remedy to the voting features of § 37-7-611 and not disturb the non-voting features of the statute. In response, the Appellees pointed out that, if the District Court did not hold

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[1] The issue actually posed to the United States by the Court concerned the effect of the Mississippi Supreme Court's decision in Greenville Public Sch. Dist. vs. Western Line Consol. Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1991), on the District Court's ability to fashion a remedy for the State's violation of the Voting Rights Act. The United States' position on that issue is unequivocal: "Greenville Public School District has no effect on the remedy that the federal court may order in this case." U.S. Br. at 15.

the entire statute ineffective, the remedy would be inconsistent with the purposes of the Voting Rights Act. If the entire statute is not ineffective, newly annexed city residents would be precluded from voting in county school board elections, even though they reside in the county school district, send their children to county schools and pay taxes to support the county schools in an amount determined by the county school board.

The United States characterized this potential remedy as "highly unusual" and "sufficiently anomalous" that the state legislature may not have intended it. U.S. Br. at 19. Thus, the United States acknowledged the "strong argument that the non-voting aspects of the repeal of [§ 37-7-611] are not sensibly severable from the voting change effected by that repeal." Id. at 18. As a result, the United States concluded that the District Court's remedial order "may well have been correct." Id. at 19. A review of the parties' positions in the District Court reveals that the substantive issue that would be addressed on remand was actually before the District Court.

Prior to the District Court's August 1993 decision in Dupree II, the State of Mississippi raised the remedy issue in the event that court held that the State failed to receive preclearance of the repeal of § 37-7-611. Citing Dotson vs. City of Indianola, 514 F. Supp. 397 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982), the State argued that "only the election features of the statute should be enjoined." State Defendants' Brief on Remand (filed June 17, 1992) at 3.[2] The State asserted that the "ultimate relief" sought by the Appellees is "the establishment of their entitlement to territory for taxation purposes and an increase in student enrollment.

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[2] The United States also cited Dotson in its brief. U.S. Br. at 16.

The state defendants submit that relief of this sort will not flow from any finding of a Section 5 violation herein." Id.

The State previously made this same argument during the preclearance process. In denying the State's request for reconsideration of his objection to the repeal of § 37-7-611, the Attorney General specifically rejected the State's position "that the changes in the procedure for extending municipal school district boundaries do not have any racial aspect but rather simply reflect an ongoing contest among school districts for students and tax base." J.S. App. 219a. The Attorney General affirmed his earlier conclusion that "the repeal of [§ 37-7-611] will essentially freeze municipal school districts in their present boundaries, which, in many instances," will have racial implications regarding the population of school districts. Id. The suggested remedy advanced by the Appellants is totally at odds with the express position of the Justice Department. In addition, their proposed remedy is likely unconstitutional. See Kramer vs. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (cited in U.S. Br. at 18 n.9.).

After the District Court issued Dupree II, the Appellants filed a Joint Motion for Remedy. Citing Dotson again, the Appellants argued:

> [T]he appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, i.e, the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in

> Lamar County and Forrest County would not be allowed to vote for the County School Boards.

J.S. App. 235a. In reply to this Joint Motion, the Appellees stated that the District Court's remedy -- the repealer of § 37-7-611 is ineffective and unenforceable -- is consistent with this Court's precedent. Plaintiffs' Reply to Defendants' Joint Motion for Remedy (filed Sept. 29, 1993) at 2-3; see Clark vs. Roemer, 500 U.S. 646, 652-53 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes."); NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 175 n.19 (1985) ("[S]tatutes that are subject to § 5 are ineffective as laws until they have been cleared by federal authorities."). Addressing the Appellants' contention that residents of the county school district be precluded from voting in county school board elections, the Appellees raised exactly the same points that led the United States to label as "highly unusual" the remedy proposed by the Appellants. Plaintiffs' Reply Memorandum at 3.

In addition, the Appellees noted that the Appellants' proposed remedy did not resolve the basis for the objection of the Attorney General to the repeal of § 37-7-611. The newly annexed city residents would remain residents of the county school district but elect indirectly the board members of the city school district by voting in city elections. Id. at 3-4. The Appellants' proposed remedy would, in effect, veto the Attorney General's objection to the repeal of § 37-7-611 and achieve indirectly what could not be achieved directly.

In its rebuttal brief in support of the Joint Motion for Remedy, Appellant Forrest County School District requested

that the District Court "fashion a remedy which alleviates the voting concerns, but which also allows the non-voting legislative objectives . . . to be enforced by this Court and others." Forrest County School District's Rebuttal Memorandum in Support of the Defendants' Joint Motion for Remedy, Joint Motion for a New Trial, or to Alter or Amend Order and Joint Motion for a Stay Pending Appeal (filed Oct. 15, 1993) at 10 [Forrest County Rebuttal Memorandum]. Appellant Lamar County School District echoed this argument: "[T]he proper remedy is an effect on voting, not an effect on the political boundaries of the school system." Lamar County Rebuttal Memorandum (filed Oct 22, 1993) at 4.

Forrest County also noted the "two possible voting remedy scenarios." Forrest County Rebuttal Memorandum at 9-10. Under one scenario, the boundaries of the school districts would remain the same and newly annexed city residents would be precluded from voting in county school board elections. Under the other scenario, the school district boundaries would not change and the annexed residents would be precluded from voting in city elections. Id. The Appellees pointed out that "under either scenario, the newly annexed residents would be prevented from voting for officeholders who could impose taxes directly on those residents." Plaintiffs' Reply to Defendants' Joint Motion for Remedy at 3.

III. In Substance, The Severability Issue Was Decided By The District Court.

Having been presented on the one hand with specific arguments by the Appellants that the District Court's remedy should be limited solely to the voting features of § 37-7-611 and, on the other hand, with the Appellees' request that the statute be enjoined its entirety, the District Court denied the

Appellants' Motion for Remedy. J.S. App. 1a. This holding is entirely appropriate because the voting change in issue is the provision in § 37-7-611 that mandates the automatic expansion of school district boundary lines after an annexation by the district's parent city.

In fact, the Appellants' proposed remedy, under which newly annexed residents would be precluded from voting in county school board elections, even though they live in the county district, send their children to county schools and pay taxes to support the county schools, does not take into account this voting change. The Justice Department has consistently viewed the change in school boundary lines to be the central focus of this case. J.S. App. 183a, 217a. In its 1992 brief on appeal, the United States concluded that "[t]he voting change effected by [the repeal of § 37-7-611]--the repeal of the automatic annexation provision of Section 37-7-611--was not identified in the 1986 submission." Brief of United States as Amicus Curiae at 15, Dupree vs. Moore, 117 L. Ed. 2d 609 (No. 90-1977). The three-judge panel and the State have viewed the automatic extension provision as the voting change in issue. J.S. App. 6a, 61a-63a, 164a.

The United States suggests the District Court's decision was affected by the knowledge that the movement of school district boundary lines in this case would be determined by the federal court supervising Hattiesburg's desegregation decree. See Br. at 17 n.8. Precisely because of the presence of the federal court's supervisory authority over the district's desegregation decree, the Appellees have not asked that the three-judge District Court hearing this Voting Rights action move school boundary lines. But, by moving school district boundary lines, the three-judge panel would not exceed its authority because, as noted above, the voting change in issue concerns school boundary lines.

By failing to comply with the Voting Rights Act, the State is precluded from enforcing the repeal of the automatic extension provision in § 37-7-611. Thus, but for the existence of the Hattiesburg District's desegregation decree, the three-judge panel could order that school boundary lines be moved. This remedy, more than the remedy pressed by the Appellants, serves the purposes of the Voting Rights Act.

Moreover, the Appellants' proposed remedy would paradoxically bring about the very result condemned by the Justice Department as racially discriminatory. In his March 31, 1989 objection letter, the Attorney General concluded that "the repeal of Section 37-7-611, by allowing for annexations to cities without the concomitant expansion of municipal school district boundaries, is likely to create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which under Mississippi law, appoints the city school board." J.S. App. 185a.

The determination of the appropriate remedy in this case confirms the Court's view that in Voting Rights Act cases the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." Clark vs. Roemer, 500 U.S. at 659. In addition, the District Court's remedy here "implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660.

IV. Conclusion

This litigation among several public bodies in Mississippi is now well into its fifth year. This appeal is the third trip to this Court. With deference to the United States, remand is unnecessary because the District Court has already

been presented with the substantive issue the United States contends should be addressed on remand. The Appellees respectfully request that this Court summarily affirm the judgment of the District Court.

RESPECTFULLY SUBMITTED,

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In The

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October Term, 1994

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THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

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vs.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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March 28, 1995

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I. THE SOLICITOR GENERAL OVERLOOKS SERIOUS ARGUMENTS ON THE MERITS OF THE SECTION 5 PRECLEARANCE ISSUE, WHICH ARGUMENTS RENDER THE PRECLEARANCE ISSUE SUBSTANTIAL

The Solicitor General takes the contradictory positions that (1) state courts have an important role in deciding voting rights issues[1] (2) but that the factually and legally parallel *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), does not constitute any precedent for the lower federal courts in voting cases. The Solicitor General urges that *Western Line* is not binding on "federal" Section 5 issues and further is subject to doubt because of the vacillation of the decision below, since on the appeal the three-judge court has reversed its previous decision and now holds that Mississippi's repealer of Section 611 has not been precleared. This observation by the Solicitor General (Brief of Solicitor General, p. 14, p. 14, n. 4) regarding the progress of the decision below does nothing to propel the argument forward in answer to this Court's question.

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[1] On page 19, note 10, the Solicitor General suggests the remedy question could be certified to the Mississippi Supreme Court. "Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from state courts, the district court may want to make use of it."

This case presents, and this Court has directed the Solicitor General to answer, a substantial question regarding state law impact on Section 5 preclearance. School districts able to litigate in state court will be governed by the Mississippi State Supreme Court's decision in *Western Line*. Those unfortunate enough to end up in federal district court will be governed by the opposite holding on remand of the three-judge district court below. The Solicitor General does not address the heart of the question proposed by this Court and the question lurking after the decision in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), where this Court held that a State has primacy in the redistricting domain under Section 2 of the Voting Rights Act. Should this state primacy also exist under Section 5? The Solicitor General posits no solution for the collision of State and federal decisions in this Section 5 voting context. This question is substantial.[2] (See the Jurisdictional Statement of the Lamar County Board of Education, et al., pp. 16-18).

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[2] Further in summarizing Judge Barksdale's dissent on the merits below, the Solicitor General omits mentioning Judge Barksdale's holding that preclearance was effected because the United States Justice Department " . . . regulations then in effect *did not require* covered jurisdictions to submit a copy of the prior law being amended or repealed," 28 C.F.R. §51.25 (1986), "but that the current regulation requires '[a] copy of any ordinance, enactment, order or regulation embodying the voting practice that is proposed to be repealed, amended or otherwise changed.' " 28 C.F.R. §51.27 (1992). J.S.App. 33a.

II. THE REMEDY FOR A VOTING RIGHTS VIOLATION BELOW, IF ANY, IS ENJOINING THE NON-PRECLEARED VOTING CHANGE. THE ISSUE IS NOT WHETHER CHANGE AFFECTING VOTING IN A PARTICULAR STATUTE IS SEVERABLE FROM THE OTHER CHANGES OF THE STATUTE.

The Solicitor General argues that "the remedial determination in . . . " this "case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid." (p. 15) That statement is followed by a citation candidly beginning with "Cf.", "e.g.", and a string cite. The Solicitor General does cite precedent of this Court directly on point, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd mem.*, 456 U.S. 1002 (1982).

Dotson comes from the State of Mississippi. The City of Indianola had annexed several large land areas, without obtaining preclearance. The three-judge district court held as a matter of law that the annexation would not be rolled back. The remedy would be that the persons in the annexed areas could not vote in city elections until the annexations had been precleared.

Here, the City of Hattiesburg has undergone many annexations into the Lamar County School District's geographic area. If those annexations are valid, as with *Dotson*, persons in the annexed areas would continue attending school in and paying taxes to the pre-annexed area Lamar County Schools, but would lose their right to vote in Lamar County School elections. In the identical situation, *Dotson's* severability was not discussed, and this Court affirmed injunctions restricting only the right to vote of citizens in the newly annexed areas.

Here, if there is a Section 5 violation, the remedy is to enjoin Lamar County citizens living within the Hattiesburg city limits from voting in Lamar County School Districts. Their children may continue attending the Lamar County Schools and their tax money will support the Lamar County Schools, just as was done in *Dotson*. The question regarding remedy is substantial. Based on *Dotson*, this Court should resolve the remedy issue and remand with directions to the three-judge district court.

The argument of the Hattiesburg School District in its Second Supplemental Brief in Support of Motion to Affirm that "in substance" the severability issue was decided by the district court is without any support of record. In its opinion, the three-judge district court did hold that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S.App. 37a. The Defendants promptly moved for a new trial, to alter or amend the court's order, or for a remedy. J.S.App. 227a-232a, 233a-238a. Without discussion, the district court summarily denied the Defendants' motions. *Id.* Section 1a, 2a. The Solicitor General supports Lamar County's position that the district court gave the plaintiffs a declaratory judgment, and not an injunction, and so is inadequate as a remedy. (Brief of Solicitor General, p. 17, n. 8). The Solicitor General argues therefore a remand is necessary to create an injunctive remedy. *Id.*

CONCLUSION

This District Court's determination that the repeal of Section 611 was not precleared and not repealed by implication is inconsistent with precedent of the highest court of the State of Mississippi, inconsistent with then existing federal regulations, and should be reversed. In the alternative, if this Court finds Section 611 was not precleared, this Court should follow its precedent in *Dotson* and hold that the appropriate remedy is one that affects voting, that is, annexed residents in Lamar County cannot vote in Lamar County School District elections.

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Nos. 94-66 and 94-82

In the Supreme Court of the United States

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v.

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LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, ET AL., APPELLANTS

v.

JOHNNY DUPREE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In light of the Mississippi Supreme Court's holding in *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1992), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear Section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-66

MIKE MOORE, ET AL., APPELLANTS

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JOHNNY DUPREE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case is before the Court for a second time. It involves the question whether the State obtained preclearance from the Attorney General under Section 5

of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for certain statutory changes affecting voting that were a part of legislation the State enacted in 1986. It also involves the question of what remedies a federal court may order for the State's failure to obtain such pre-clearance.

1. Prior to 1986, Mississippi law provided for two entirely different ways in which municipal school district boundaries could be altered.

First, municipal school district boundaries could be enlarged "non-consensually" when the city in which the district was located annexed territory from a neighboring political unit. Under the relevant pre-1986 statute—Miss. Code Ann. § 37-7-611 (1972) (Section 611)—when a city with a municipal school district annexed territory from the same or a neighboring county, the municipal school district automatically expanded to become coextensive with the new city limits. This expansion occurred as a matter of law, regardless of the consent of the relevant county board of education or school board of the district losing the territory. See J.S. App. 10a-11a & n.6.

Second, municipal school district boundaries could also be enlarged (or diminished) "consensually," when both the county board of education and the municipal school district board agreed on the change. See Miss. Code Ann. § 37-7-103 (1972) (J.S. App. 122a). In such cases, no municipal annexation or other change to any other political boundary would be involved.

Under Mississippi law, the school board of a municipal school district is ordinarily chosen by the city's elected governing body. Miss. Code Ann. § 37-7-203 (1990). Members of non-municipal school district boards, on the other hand, are ordinarily directly elected by county voters. Miss. Code Ann. § 37-7-207 (1990).

2. In 1986, the state legislature enacted the Uniform School Law, S.B. No. 2117, 1986 Miss. Laws ch. 492, omnibus legislation revising the entire state education code. Among the many changes effected by this statute, Section 47 of the new statute specifically repealed 23 provisions of state law, including Section 611's provision for non-consensual enlargement of municipal school district boundaries upon a city's annexation of territory. J.S. App. 121a. In addition, Section 52 of the new statute (J.S. App. 122a-123a) made some amendments to the consensual system for school district boundary changes provided for in Miss. Code Ann. § 37-7-103.

3. In July, 1986, the Attorney General of the State of Mississippi submitted the Uniform School Law to the Attorney General of the United States for preclearance under Section 5. J.S. App. 12a. The State's submission included a copy of the new statute, a letter from the state attorney general, and a 467-page, loose-leaf notebook entitled "Senate Bill Number 2117—Comparison of Current and New Law." *Id.* at 78a, 93a-152a.

The state attorney general's letter stated that the "'Mississippi Uniform School Law of 1986' * * * is submitted * * * in its entirety." J.S. App. 81a. The letter continued: "For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review." *Ibid.* Thirteen of the 205 sections in the bill were discussed in the letter. The loose-leaf notebook contained the text of every provision of the Uniform School Law, together with photocopied pages containing the provisions of prior state law, if any, that were to be amended by each provision.

a. The State's letter did not discuss Section 47, which repealed Section 611. J.S. App. 13a. The text of Section

47 consists entirely of a statement that 23 cited provisions of state law—including Section 611—that "provide for the creation and operation of municipal separate school districts[] are hereby repealed." *Id.* at 121a. Although the accompanying notebook included the text of Section 47, it did not include the texts of the 23 provisions to be repealed.

b. The State's letter did discuss Section 52, which amended the method of altering school district boundaries with the consent of the school boards involved. The letter explained that Section 52 changed existing law by allowing any school board to engage in mutually agreed-upon transfers of school district territory with adjacent districts, including municipal school districts, without the consent of the county school board, as previously required. J.S. App. 83a. In describing Section 52, the letter did not mention Section 611 of the old law in this connection. The loose-leaf notebook accompanying the letter compared the text of Section 52 with the text of the statutory provision it replaced. *Id.* at 122a-123a. The notebook did not otherwise explain the effect that the enactment of Section 52 had on existing law.

On August 29, 1986, the Assistant Attorney General for Civil Rights, acting on behalf of the Attorney General of the United States (see 28 C.F.R. 51.3), informed the State that the Attorney General did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." J.S. App. 14a, 156a.

4. More than one year later, on December 30, 1987, the State expressly and separately submitted the repeal of Section 611 by Section 47 of the Uniform School Law for preclearance to the Department of Justice. J.S. App. 158a-168a. The submission explained that Section 47

repealed Section 611, and it outlined the nature of that change. In distinguishing Section 47 from Section 52, the submission stated:

> *It is the automatic expansion of the school district which has been repealed by the instant submission.* The option to expand, however, is not forclosed [*sic*]. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

Id. at 164a (emphasis added). In response to the submission, the Attorney General requested additional information from the State, which was ultimately provided. On March 31, 1989, the Attorney General interposed an objection to the repeal of Section 611. *Id.* at 183a-186a. The State asked the Attorney General to reconsider his objection. *Id.* at 187a-216a. On May 25, 1990, the Attorney General advised the State that the objection would not be withdrawn. *Id.* at 217a-221a.

5. After the enactment of the Uniform School Law, J.S. App. 6a, the City of Hattiesburg, Mississippi, annexed neighboring territory in Forrest and Lamar Counties, by filing a petition for annexation in state chancery court and obtaining a favorable ruling on that petition. See Miss. Code Ann. §§ 21-1-27 *et seq.* (1990 & Supp. 1994). On February 23, 1990, plaintiffs—residents and voters of the City of Hattiesburg and members of the Board of Trustees of its municipal school district—filed this suit in the United States District Court for the Southern District of Mississippi pursuant to Section 5 of the Voting Rights Act of 1965, naming as defendants the State of Mississippi and its governor and attorney

general. J.S. App. 46a-47a. Plaintiffs sought, *inter alia*, to enjoin enforcement of the 1986 Uniform School Law, insofar as it repealed Section 611.[1] After a three-judge court was convened, the two affected county school districts (those of Lamar and Forrest Counties) and their trustees intervened as defendants. *Id.* at 47a. The United States filed a brief as amicus curiae in support of plaintiffs, arguing that the repeal of Section 611 had not been precleared and that it therefore could not go into effect. *Id.* at 47a n.2.

On April 2, 1991, the three-judge district court held that the Attorney General had precleared the 1986 repeal of Section 611 when he failed to interpose any objection to the State's 1986 submission. J.S. App. 45a-73a. The court refused to enjoin enforcement of the repealer of Section 611 and gave judgment for the defendants. *Id.* at 72a.[2]

6. While this federal court suit was pending, the question whether the repeal of Section 611 had been precleared was also being litigated through the state court system. On December 12, 1990, the Mississippi Supreme Court decided *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (1990), cert. denied, 112 S. Ct. 1512 (1992). In that case, which did not involve the Hattiesburg school district, the Mississippi court held that it had

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[1] The result of the requested injunction would be that Section 611 would remain in effect. As a consequence, Hattiesburg's annexation of neighboring territory from Forrest and Lamar Counties would result in that territory automatically becoming part of the Hattiesburg municipal school district.

[2] The result of this decision was that the territory annexed by Hattiesburg did not become part of the Hattiesburg municipal school district, but remained part of the county school districts to which it belonged prior to the annexation.

concurrent jurisdiction with local, three-judge federal district courts to determine whether the repeal of Section 611 had been precleared pursuant to Section 5 of the Voting Rights Act. 575 So. 2d at 959.

On the merits, the state court agreed with the three-judge district court's holding that the repeal of Section 611 had been precleared in 1986. The state court held that the Attorney General had in effect precleared the repeal of Section 611 when he precleared Section 52. According to the state court, "[e]ven assuming [Section 611] was not specifically repealed [by Section 47], it was implicitly repealed by [Section 52]." 575 So. 2d at 963. In the state court's view, Section 52 was "a subsequent enactment covering a field of operation co-existent with [Section 611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." *Ibid.* In that situation, the court held, a "repeal * * * arise[s] by necessary implication from the enactment of a subsequent act." *Ibid.*

7. An appeal of the three-judge district court's initial decision in this case reached this Court at approximately the same time as did the petition for a writ of certiorari from the Mississippi Supreme Court's decision in *Greenville Public School District.* This Court vacated the judgment of the district court and remanded "for further consideration in light of *Clark v. Roemer*, 500 U.S. [646] (1991)." *Dupree* v. *Moore*, 112 S. Ct. 1462 (1992) (see J.S. App. 74a). The Court denied certiorari in *Greenville Public School District.* 112 S. Ct. 1512 (1992).

8. On remand, the three-judge district court held that the State's submission of the 1986 Uniform School Law had not presented to the Attorney General for preclearance either of the two provisions of that Act (Sections 47 and 52) identified by the State as having

repealed Section 611. The court relied on *Clark* v. *Roemer*, 500 U.S. 646 (1991), which had held that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority," *id.* at 656, and that a State "must identify with specificity each change that it wishes the Attorney General to consider" in a Section 5 preclearance submission, *id.* at 658.

Applying those principles, the district court held that when the State submitted the Uniform School Law in 1986, the State had clearly and unambiguously submitted only those 13 sections it specifically had identified in its submission as affecting voting. J.S. App. 20a. Because the State had not specifically identified Section 47, which expressly repeals Section 611, the voting change contained in that section was held not to have been properly submitted.

With respect to Section 52, the court recognized that the State had specifically identified Section 52 in its initial Section 5 submission in 1986. But, the court noted, the State's 1986 submission did not explain that Section 52 had any effect on Section 611. The Attorney General accordingly could not have known at the time of the submission that Section 52 repealed Section 611 "by implication." Thus, the district court held that that "implicit repeal" was not submitted under Section 5 and, consequently, had not been precleared. J.S. App. 20a-21a & n.10. The district court concluded that to "permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle" would be inconsistent with the "clear pronouncement" of this Court in *Clark*. *Id.* at 22a. Accordingly, the court held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable" unless and until the State obtains preclearance. *Id.* at 37a.

Circuit Judge Barksdale dissented. J.S. App. 23a-34a. In his view (*id.* at 25a-26a), the facts surrounding the initial attempt to preclear Mississippi's 1986 Uniform School Law were distinguishable from those in *Clark* and its precursor, *McCain* v. *Lybrand*, 465 U.S. 236 (1984), because the State here sent a copy of the actual legislation for which preclearance was sought with its request for preclearance. J.S. App. 29a. In Judge Barksdale's view, the submission therefore at least put the Attorney General on notice of the existence of the two sections that repealed Section 611. *Id.* at 30a-33a. For that reason, Judge Barksdale would have ruled that the repeal of Section 611 was adequately submitted and precleared because no timely objection had been interposed by the Attorney General.

9. Defendants moved the district court for a new trial, to alter or amend the court's order, or for a new remedy. J.S. App. 227a-232a, 233a-238a. They alleged, *inter alia*, that the court had failed to render judgment "upon the whole case or for all the relief asked," *id.* at 234a,[3] and that the court should have fashioned relief that would have precluded only the voting change effected by the repeal of Section 611, while permitting the balance of the repeal of Section 611 to go into effect. See *id.* at 228a-229a, 234a-235a. In practical terms, granting defendants' motion apparently would have meant that the children in the area annexed by Hattiesburg would continue to go to school in their pre-annexation, county school districts and that the residents of the annexed area would continue to pay school taxes to those pre-annexation districts, while the residents of the annexed area would lose their right to vote for the county school board to

[3] In fact, the district court failed to enter a separate judgment, as required by Fed. R. Civ. P. 58.

which they paid taxes and whose schools their children attended. The district court summarily denied defendants' motion. *Id.* at 1a-2a.

DISCUSSION

This Court has requested the United States to address the following question:

> In light of the Mississippi Supreme Court's holding in *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

In *Greenville Public School District*, the Mississippi Supreme Court held that Section 52 of the Uniform School Law implicitly repealed Section 611. 575 So. 2d at 963. That ruling conclusively determines the effect of Section 52 on Section 611 as a matter of state law. See J.S. App. 20a-21a & n.10. Since the repeal of Section 611 would be a change in law affecting voting in a covered jurisdiction, however, it must be precleared before it can be enforced; that is true whether the repeal is by implication (as with Section 52) or is done explicitly (as in Section 47). We therefore agree with the district court that any voting change caused by the repeal of Section 611 may not be enforced, and the district court's ruling on the merits in this case should therefore be summarily affirmed. The repeal of Section 611, however, has important state law consequences other than its effect on voting. The repeal determines the schools that children in the area annexed by Hattiesburg attend and

the school district to which residents of the annexed area pay taxes. These non-voting consequences create a significant remedial issue that in our view warrants a remand to the district court for further proceedings.

1. Mississippi is a jurisdiction that is covered under Section 5 of the Voting Rights Act. Accordingly, before the State may put into effect any state law that makes a change affecting voting, it must either obtain pre-clearance from the Attorney General of the United States or it must bring an action in the United States District Court for the District of Columbia, seeking a declaration that the new state law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. If the Attorney General fails to interpose an objection, or if the State obtains the declaratory judgment, the State may put the new law into effect. If neither of those events occurs, the State may not.

In this case, the State did not seek judicial preclearance of the repeal of Section 611. Since the repeal of Section 611 would be a change in state law affecting voting, the enforceability of the repeal, insofar as it affects voting, therefore depends on whether the Attorney General ever precleared it. If the Attorney General precleared the repeal of Section 611, then the State may enforce that repeal and cease to apply Section 611. That would be true regardless of whether the Attorney General precleared the "express" repeal of Section 611 (by Section 47 of the Uniform School Law) or the "implied" repeal of Section 611 (by Section 52 of the Uniform School Law). But if the Attorney General did not preclear either the express repeal or the implied repeal of Section 611, then the State may not put any voting change effected by that repeal into effect.

The district court in this case correctly ruled that neither the express nor the implied repeal of Section 611 had ever been precleared. That conclusion follows from this Court's decision in *Clark*. In *Clark*, the district court had held that certain voting changes made by earlier enactments and never submitted for preclearance were in effect precleared when the Attorney General precleared later legislation incorporating the earlier changes. This Court held, however, that the preclearance of the later legislation did not operate to preclear the earlier changes, because the State had never identified the earlier changes in the preclearance papers it submitted to the Attorney General. The Court ruled that "a submission pertains only to *identified* changes in that legislation" and that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." 500 U.S. at 656 (emphasis added).

In this case, the State's initial 1986 Section 5 submission of the Uniform School Law to the Attorney General failed to identify Section 47 as a provision that made a voting change; the only information provided concerning the effect of Section 47 was the statutory language stating that it repealed prior provisions that "provide for the creation and operation of municipal separate school districts." J.S. App. 121a. That statement did not refer to any voting change. The State thus did not "identify with specificity," *Clark*, 500 U.S. at 658, that Section 47's repeal of Section 611 made a voting change. Moreover, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Clark*, 500 U.S. at 656 (citing *McCain*, 465 U.S. at 257). Since the State's submission could not be found to have unambiguously identified the voting change effected by the repeal of Section 611, the

Assistant Attorney General's letter, stating that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in [the State's] July 22, 1986, letter," J.S. App. 156a, did not operate to preclear the repeal of Section 611.

As the district court in this case correctly held, the same conclusion follows with respect to what the Mississippi Supreme Court in *Greenville Public School District* termed the "implied repeal" of Section 611 that occurred when Section 52 of the Uniform School Law was enacted. Although the text of Section 52 (unlike the text of Section 47) was submitted as a voting change, the explanation of that change was that it provides for alteration of school district boundaries—including municipal school district boundaries—with the consent of the school boards involved. See J.S. App. 83a. Since nonmunicipal school boards are elected, the alteration of their boundaries is a change affecting voting. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Nothing in the text of Section 52 or in the State's submission, however, stated that Mississippi law had previously provided in Section 611 for nonconsensual expansion of municipal school district boundaries, or that the new method provided for in Section 52 would preclude the application of Section 611 and would henceforth be the *sole* method for altering school district boundaries. Therefore, as the district court held, "even if Section 52 in effect amounted to a repeal of [Section 611] by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 20a-21a.

The district court's conclusion that Section 611 was not repealed insofar as it affects voting conflicts with the conclusion reached by the Mississippi Supreme Court in *Greenville Public School District* that Section 52 impliedly repealed Section 611 and that Section 52's

effect on voting *was* precleared under Section 5 of the Voting Rights Act. The Mississippi Supreme Court has the last word on the meaning of Section 52 as a matter of state law. But it does not have the final word on the interpretation of Section 5 of the Voting Rights Act or on the effect of Section 5 on the attempted repeal of Section 611, both of which are issues of federal law. As we explained in our submission to this Court in response to its invitation in the *Greenville Public School District* case itself, a state court decision does not constitute binding precedent on the lower federal courts on a question of federal law. See 90-1861 U.S. Br. 17-18. See also *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942).[4] It would be particularly inappropriate to recognize any such final state court authority over an issue of federal law where, as here, Congress has expressly provided that three-judge federal district courts be the forum for the litigation of the federal issue involved.[5] Nor could the Mississippi Supreme Court's ruling in *Greenville Public School District* have any res judicata effect on the plaintiffs in this case, who were not

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[4] In addition, the Mississippi Supreme Court decided *Greenville Public School District* prior to this Court's clarification of the governing legal standards in *Clark*, so that its precedential weight would in all events be subject to doubt.

[5] Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges * * * and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c. We recognize that this provision does not preclude a state court from deciding a Section 5 coverage issue that is collateral to an action otherwise properly before it. See *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). As we stated in our submission to this Court in *Greenville Public School District*, however, there is substantial doubt that the state court had jurisdiction to decide the Section 5 coverage issue in that case, since it was not merely collateral to a state-law claim otherwise before the court. See 90-1861 U.S. Br. 15-19.

parties there. See *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982). Accordingly, the Mississippi Supreme Court's decision in *Greenville Public School District* has no effect on the remedy that the federal court may order in this case.

2. There remains the question of what remedies may be ordered by the three-judge district court for the State's failure to obtain preclearance of the repeal of Section 611. Section 5 requires preclearance of changes affecting voting in covered jurisdictions. *Connor* v. *Waller*, 421 U.S. 656 (1975) (per curiam); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam). Therefore, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes," *Clark*, 500 U.S. at 652-653, at least absent "extreme circumstance[s]" of a sort not present here, *id.* at 654.

Where, as in this case, an unprecleared law operates to make both a change affecting voting and a change that does not affect voting, the question of how to fashion a remedy becomes more complex. In this kind of case, the Section 5 court is in much the same position as a court that has found a portion of a state statute to be unconstitutional or otherwise invalid as a matter of federal law. The remedial determination in such a case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid. Cf., *e.g.*, *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2212 & n.8 (1993); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 459-461 (1992); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988); *Weaver* v. *Graham*, 450 U.S. 24, 36 n.22 (1981); *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co.*, 278 U.S. 235,

241 (1929). If it is severable, the court should issue relief directed to the invalid portion (here, the voting change) and permit other portions of the statute (here, the non-voting changes in state law made by the statute) to go into effect. See *Dotson* v. *City of Indianola*, 514 F. Supp. 397, 403 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982). If the court finds that the valid portion of the statute is not severable, the court should direct its relief to operation of the entire statute.

The repeal of Section 611 changed state law in ways that affected voting, because it altered the school district in which people living in areas annexed by a city would vote.[6] Had there been no repeal, people living in the annexed areas would no longer vote in their pre-annexation school district, since the area in which they live would no longer be part of that district. Under the repeal, however, they would continue to vote in the pre-annexation school district, since (absent the consent of both districts involved) they would still live in it.

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[6] Appellants in No. 94-82 claim (J.S. 13-14) that plaintiffs in this case—members of the Hattiesburg school board and voters in Hattiesburg—lack standing. As we understand it, appellants assert that plaintiffs were not injured by the failure to preclear the repeal of Section 611 because plaintiffs' votes will be unaffected by the only remedy to which they would be entitled in this case—an order that those living in the annexed territories will no longer be able to vote in elections for the school board of their pre-annexation school district. As we explain below, however, it is possible that broader relief than this would be appropriate. See pp. 18-19, *infra*. Plaintiffs also claim that some city voters are being permitted to vote in the pre-annexation, county school districts as well as in city elections, while other city voters can vote only in city elections, and they seek a remedy to redress that alleged inequality. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 738 & n.4 (1984) (citing cases).

But the repeal of Section 611 also changed state laws in significant ways that did *not* affect voting. Had there been no repeal, children in an area annexed by a municipality would attend the city's schools and residents of the annexed area would pay taxes to support those schools.[7] Under the repeal (and, again, absent the necessary consent), the children in the annexed area would continue to attend schools operated by the pre-annexation school district and residents in the annexed area would continue to pay taxes to the pre-annexation school district. Those effects on school attendance and taxation are not themselves changes in state law affecting voting. It would therefore be theoretically possible to implement the non-voting changes made through the repeal of Section 611 (the changes in school attendance and taxes) while not implementing the voting changes. If this were done, the annexed area would remain in the county school districts for all purposes except voting.

The district court in this case held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S. App. 37a.[8] That holding appears to

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[7] With regard to taxation, Mississippi law generally provides that a minimum education tax, supplemented by an additional amount authorized by the school board, be imposed on property within a school district and be paid to the school district. See Miss. Code Ann. §§ 37-57-1, 37-57-105 (1990 & Supp. 1994).

[8] In this case, it appears that the district court gave plaintiffs only a declaratory judgment—not an injunction—as a remedy. That may well have been because the Hattiesburg school district is operating under a continuing desegregation order, and the city school board must obtain the permission of the desegregation court before it may change its boundaries. See 94-66 J.S. 29 n.10; 94-66 & 94-82 Mot. to Aff. 18 n.6. The basic remedial principles set forth in the text, however, apply equally to injunctions and declaratory judgments. If the non-voting effects of the new law are severable,

constitute a conclusion that the repeal of Section 611 is unenforceable in its entirety. Before reaching that conclusion, however, the district court should have determined whether the non-voting changes effected by the repeal of Section 611 were—as a matter of state law—severable from the voting changes.[9] There is no indication in the district court's opinion that it undertook such a determination. (Although the issue was raised by appellants in their motions to alter or amend the order, the district court summarily denied those motions.) Therefore, we agree with appellees that this case should be remanded to the district court with instructions to determine whether the repeal of Section 611 should be declared invalid in its entirety, or whether the repeal of Section 611 should be declared invalid only insofar as it affects voting, permitting the pupil assignment and taxation issues to be governed by the new state law.

We do not mean to suggest that a conclusion that the repeal of Section 611 should be unenforceable in its entirety was incorrect. There is, in fact, a strong argument that the non-voting aspects of the repeal of Section 611 are not sensibly severable from the voting change effected by that repeal. If the non-voting aspects

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the district court should issue a declaration that only the voting aspects of the repeal of Section 611 may not be enforced. If the non-voting effects of the new law are not severable, the district court should issue a declaration that the entire repeal of Section 611 is not enforceable.

[9] There may also be federal constitutional issues that would be raised if a State decided not to permit residents of a school district to vote in school board elections. See *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969). The district court would of course have to take any such issues into account in determining the severability issue.

of the repeal were permitted to proceed, but the voting change was not enforceable, the citizens of the annexed territories would be left in a highly unusual position. They would continue to send their children to the schools run by their pre-annexation, county school boards and they would continue to pay property taxes to support those schools, but they would be unable to vote for membership on those school boards. That situation would be sufficiently anomalous that it could lead to a conclusion that the state legislature would not have intended it—*i.e.*, that the non-voting aspects of the repeal of Section 611 are not severable from the voting aspects.

Although the district court's remedial order thus may well have been correct, we think that, in the absence of any reason to believe that the district court engaged in any analysis of the severability issue, it would be appropriate to remand the case to the district court for further remedial proceedings. Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from the state courts, the district court may want to make use of it.[10] In the absence of any such means, the district court, which sits in Mississippi and whose judges must regularly address state-law issues in other contexts, is

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[10] Rule 20 of the Rules of the Mississippi Supreme Court provides for certification of questions of law to that court "from the [United States] Supreme Court or * * * any United States Court of Appeals." Although this rule does not provide for certification requests from a federal district court, no provision of state law expressly precludes acceptance of a certified question from such a court.

in the best position to make that determination in the first instance.

CONCLUSION

The district court's determination that the repeal of Section 611 was not precleared is controlled by this Court's decision in *Clark* v. *Roemer* and should be summarily affirmed. The case should be remanded to the district court for further remedial proceedings to inquire into whether, as a matter of state law, the non-voting aspects of the repeal of Section 611 are severable from the effects on voting of the repeal of Section 611.

Respectfully submitted.

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